

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.467 OF 2015

Shri Satyanarayan M. Agarwal	]	
(now deceased)	]	
1(a) Mr. Krishnawatar S. Agarwal and Ors.	]	... Applicants

Versus

Smt. Kamladevi Daga and Ors.	]	... Respondents
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WITH

CIVIL REVISION APPLICATION NO.468 OF 2015

Shri Satyanarayan M. Agarwal	]	
(now deceased)	]	
1(a) Mr. Krishnawatar S. Agarwal and Ors.	]	... Applicants

Versus

Shri Vishwanath Chaudhary and Anr.	]	... Respondents
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Ms. Uma S. Agarwal, Applicant No.1(c) in both CRAs, present in person.

Mr. V. S. Pandey i/b Mr. S. U. Pandey for Respondent No.1 in both CRAs.

Mr. Ramawatar Agarwal, Respondent No.2 in both CRAs, present in person.

CORAM :- M. S. SONAK, J.

DATE :- SEPTEMBER 15, 2015

P. C. :-

1. Rule.
2. With the consent of and at the request of learned Counsel for parties, Rule is made returnable forthwith.
3. These petitions challenge orders dated 10/07/2015 by which the Division Bench of the Small Causes Court (Revisional Court) has permitted the Respondent i.e. the original Defendant in the suit, to amend the written statement by introducing para 1A which reads as under :-

*“The Defendant state and submits that the Plaintiff is claiming to be owner and landlord of the building known as Tai Sadan wherein the suit premises is situated. The Defendant submits that he has been served with the copy of letter addressed by Mrs. Geetadevi Agarwal and Mr. Sitaram Agarwal vide their Advocate's letter dated 12/11/2011. Hereto annexed and marked **Exhibit-I** is copy of N. S. Fadia's letter dated 12/11/2011. The Defendant shall crave leave to refer to and rely upon copy of the said letter when produced. The Defendant submits that as per statement made in para 2 of the said letter that Mahadeolal Agarwal had acquired suit plot of land bearing Plot No.9 and the had blended the same with character of*

HUF property and the said plot became property in common stock of his HUF and then the building including garage erected on the said plot were constructed by Mahadeolal Agarwal HUF. The Defendant further submits that it is a matter of record and information in the said letter that the tenancy was created by Mahadeolal Agarwal HUF and the Defendant was paying rent to Mahadeolal Agarwal HUF and the said defence has been defence of Defendant in original written statement filed by the Defendant. The Defendant, therefore, submits that the suit as it is framed and filed by the Plaintiff is not maintainable and the same deserves to be dismissed and the Defendant accordingly prays that the suit of the Plaintiff be dismissed with costs.”

4. Ms. Uma S. Agarwal, Applicant No.1(c) in both Civil Revision Applications, who states that she has the Power of Attorney on behalf of the remaining Applicants as well and who is herself a lawyer, has attacked the impugned order made by the Revisional Court on the following grounds :-

- (a) That in the present case, the trial has commenced in the year 2008 and therefore, there is inordinate delay in applying for leave to amend.
- (b) There are in all 4 cases instituted by the Applicants against 4 separate tenants. Only in two of such cases, leave to amend

has been granted. On the basis of the order impugned in this petition, it is likely that the parties in the two other cases will also claim similar benefits, even though the said parties have not challenged the order by which the leave to amend had been declined to them.

- (c) The proposed amendment challenges the entire nature of the defence. This will occasion immense prejudice to the Applicants, particularly as the original Plaintiff, who was in the witness box from the year 2008 until his demise on 08/08/2012, is no longer available to answer, in the context of the altered defence.
- (d) Since leave to amend has been applied for after the commencement of the trial, it was incumbent upon the Defendants to both plead as well as establish diligence on their part. Admittedly, the letter dated 12/11/2011, which is the basis for seeking amendment, was received by the Defendants on 16/11/2011. The application seeking leave to amend was however made only on 17/07/2012. There is no explanation whatsoever in the application explaining such inordinate delay of 8 months. Therefore, applying the principles set out in proviso to Order 6 Rule 17 of the CPC, leave to amend should have been denied.
- (e) The Trial Court, upon correct appreciation of facts and principles, had rightly declined leave to amend. The Revisional Court, without recording any reason, has incorrectly interfered with the order made by the Trial Court.

5. Mr. Pandey, learned Counsel for Respondent No.1 (the Defendant who had applied for leave to amend), submitted that the amendment is vital for the defence, particularly as on 30/09/2011, the issue of denial of title has been framed by the Trial Court. Mr. Pandey submitted that the proviso to Order 6 Rule 17 of the CPC requires a party to explain, as to why in spite of due diligence, the matter could not have been raised before the commencement of the trial. In this case, since the amendment is based upon the letter dated 12/11/2011, obviously, the Respondent could not have applied for amendment on the basis of the said letter prior to the commencement of the trial. Insofar as the period between 16/11/2011 and 17/07/2012 is concerned, although the learned Counsel admitted that there is no explanation as such in the application seeking leave to amend, the Respondent was otherwise diligently pursuing the matter and the marginal delay, has not occasioned any prejudice whatsoever to the Applicant. Finally, Mr. Pandey submitted that the impugned order does not suffer from any jurisdictional error and therefore, the same may not be interfered with by this Court under Article 227 of the Constitution of India.

6. Mr. Ramawatar Agarwal, who has been impleaded as Respondent No.2 in these Civil Revision Applications, appeared in person and submitted that principles of natural justice require that any document should be permitted to be produced at any stage of the proceeding. Mr. Ramawatar Agarwal admitted that in this case, he had not applied for any amendment of pleading.

7. Rival contentions now call for my determination.

8. The proviso to Order 6 Rule 17 of CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before commencement of the trial. In the present case, as noted earlier, the entire amendment is based upon the letter dated 12/11/2011. This letter, is stated to have been received by the Respondent No.1 on 16/11/2011 i.e. much after the commencement of the trial in the year 2008. Since the letter dated 12/11/2011 was not even in existence prior to the commencement of the trial, the proviso in Order 6 Rule 17 of the CPC will not apply with all its vigor to the facts and circumstances of the present case. However, the aforesaid does not obviate the necessity for the Respondent No.1 to explain the delay and to further make out a case that the proposed amendment is indeed necessary in the facts and circumstances of the case. In the written statement filed by the Respondent No.1, there is already the defence that rents in respect of the suit premises were paid to the HUF. If the text of the proposed amendment is perused, then it is clear that the Respondent No.1 seeks to take up the defence that the suit premises are held by the HUF and not the Applicants in their individual capacity. In this sense therefore, the defence is not totally different or in any case, defence is not inconsistent. It is settled position in law that alternate defences can always be taken in the written statement.

9. The submission that evidence had commenced from the year 2008 and therefore amendment could not have been applied earlier, cannot, in the facts and circumstances of the present case, be accepted. At the point of repetition, it is to be noted that the amendment is based upon the letter dated 12/11/2012. As such, the amendment could not have been applied for prior to the commencement of the trial. This is also not a case of some marked change in the nature of the defence. In fact, the proposed amendment is in the nature of elucidation of the defence already raised. The circumstance that two other cases where such amendment has not been applied for or, having applied for, the same has been rejected, might also be reopened is not really a circumstance that is required to be considered at this stage. Any observations with regard to the other two cases will not be appropriate, particularly as the Defendants in the said two cases are not before this Court.

10. The contention of Ms. Uma Agarwal, however, that no explanation has been furnished for the delay between 16/11/2011 and 17/07/2012, is correct. Considering that this is a case which was instituted in the year 2006, the Respondent should have acted with greater diligence. Further, considering the case of the Respondent No.1 that the proposed amendment was vital for the purposes of defence, the Respondent No.1 could have certainly acted with greater diligence. On account of delay on the part of the Respondent No.1, some amount of prejudice is bound to occasion to the Applicants. However, the Revisional Court is right that such prejudice is one which

is compensable in terms of costs. In the facts and circumstances of this case, however, the Revisional Court has imposed very paltry costs. The circumstance that there is delay of about 8 months in seeking amendment, is not a circumstance sufficient to interfere with the impugned order and to decline the Respondent No.1 leave to amend. However, this is one of the circumstances to be taken into consideration at the stage of imposition of costs. Further, it is to be noted that even after the receipt of letter 12/11/2011, the Respondent has proceeded with the cross-examination of the original Plaintiff in the months of April and June 2012. Amendment was applied for only on 17/07/2012 and the original Plaintiff who was in the witness box, expired on 08/08/2012. Although, the discretion exercised by the Appeal Court need not be interfered with, it must be noted that the prejudice, at least in logistical terms for the Applicants, is bound to be immense and for this, they are required to be suitable compensated.

11. Accordingly, the impugned order, to the extent it grants the Respondent No.1 leave to amend, is not interfered with. However, the amount of costs are enhanced from Rs.3,000/- (Rupees Three Thousand Only) to Rs.1,00,000/- (Rupees One Lac Only) in each of the Civil Revisions Applications. Accordingly, the Respondent No.1 in each of the Civil Revision Applications to pay costs of Rs.1,00,000/- within a period of four weeks from today. In case the costs are deposited within a period of four weeks from today, the Trial Court to permit the said Respondent to carry out amendment to their written statement. In case, the costs are not deposited, then the application

seeking leave to amend shall stand dismissed without any further reference to this Court.

12. Rule is made absolute to the aforesaid extent. There shall be no separate order as to costs.

(M. S. SONAK, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Order.